

file

BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals



Application of O-Ton-Kah Park Property Owner's
Association for a Permit to Place a Pier on the Bed
of Lake Beulah, Town of East Troy, Walworth
County, Wisconsin

Case No. 3-SE-97-0333

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

O-Ton-Kah Park Property Owner's Association (the Association), by Attorney Patrick Hudec, P. O. Box 167, East Troy, Wisconsin 53120, filed an application with the Department of Natural Resources pursuant to sec. 30.12, Stats., for a permit to place a pier on the bed of Lake Beulah in the NE 1/4 of the NE 1/4 of Section 9, Township 4 North, Range 18 East, Town of East Troy, Walworth County.

On July 21, 1997, the Department of Natural Resources issued a Dismissal, Findings of Fact and Conclusions of Law stating that the applicant is not a riparian owner at the subject property and therefore not eligible to apply for a permit pursuant to sec. 30.12, Stats. The Department concluded that Shore Drive Partnership is the fee-title owner at the subject property. Shore Drive Partnership has a pending application with the Department, docket #3-SE-96-234, for two piers at the subject property.

On August 8, 1997, O-Ton-Kah Park Property Owner's Association, by Attorney Hudec, requested a contested case hearing on the issue of whether the Association has riparian status, pursuant to sec. 227.42, Stats., and that the same be joined with the hearing on the application of Shore Drive Partnership, as referenced above.

Pursuant to due notice hearing was held on August 25, 1997, before Jeffrey D. Boldt, administrative law judge (the ALJ). The parties requested the opportunity to submit written briefs and the last brief was received on October 17, 1997.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources (the DNR or the Department), by

Michael Lutz, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

Lake Beulah Management District, by

David M. Reddy, Attorney
P. O. Box 318
Elkhorn, Wisconsin 53121-0318

Shore Drive Partnership, by

Chris Trebatoski, Attorney
Michael, Best & Friedrich
100 East Wisconsin Avenue, Suite 3300
Milwaukee, Wisconsin 53202

O-Ton-Kah Park Property Owners, by

Patrick J. Hudec, Attorney
P. O. Box 167
East Troy, Wisconsin 53120-0167

Lake Beulah Yacht Club, by

Robert Mueller
N9124 Humphrey Lane
East Troy, Wisconsin 53120

Lake Beulah Protective & Improvement Association, by

Raymond Olson, Jr.
N9174 Oakwood
Mukwonago, Wisconsin 53149

FINDINGS OF FACT

1. O-Ton-Kah Park Property Owner's Association (the Association or the Applicant), c/o Attorney Patrick Hudec, completed filing an application with the Department for a permit under sec. 30.12, Stats., to place a pier on the bed of Lake Beulah, Town of East Troy, Walworth County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

The applicants seek to place a pier structure on the bed of Lake Beulah in the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 9, Township 4 North, Range 18 East, Walworth County. The owner of the subject parcel is the Shore Drive Partnership, which is also seeking a permit to place structures at the same site.

2. The applicants have an easement in the above-described real property which is located in the Town of East Troy, Walworth County. The Association consists of non-riparian backlot owners of property in the O-Ton-Kah Park Subdivision (the Subdivision). The Subdivision is located on the landward side of East Shore Drive, well away from the lake. (Ex. 18)

3. The applicants propose to construct a pier adjacent to a bar and restaurant known as the Dockside. The Dockside property consists of two parcels, a 32 foot wide riparian parcel on the north and an 80 foot parcel on the south.

The south parcel is an area over which O-Ton-Kah shares rights that were reserved in a 1939 Warranty Deed from their predecessors in title to Dockside's predecessor in title. The deed was recorded March 23, 1939. (Ex. 12) The relevant portion of the Deed states:

The parties of the first part reserve for themselves, their heirs and assigns and the owners in O-Ton-Kah Subdivision and any others along the channel, the use of the channel as a means of ingress and egress, and also reserving for themselves and such owners, the right in common with the parties of the second part for themselves and guests to use the lake shore for bathing, boating or kindred purposes.

The subdivision seeks to place a ten-slip pier structure accommodating 10 mooring slips or shore stations. The proposed pier would be approximately 117 feet long. The proposed pier would consume approximately 35 feet of shoreline parallel to the 80 foot wide easement on the south parcel owned by Shore Drive Partnership. (Ex. 20)

4. On its face, the easement does not grant the Association the right to maintain a pier at the site. The Wisconsin Supreme Court considered this easement and shoreline in connection with a declaratory judgment proceeding and subsequent summary judgment motion which was granted by the Walworth County Circuit Court. The Wisconsin Supreme Court held as follows:

In the case of an easement, title does not pass but only the right to a limited use of the land of another. The subdivision owners did not become riparian owners based upon the easement; but they did obtain the right to use the partnership's lakeshore to access Lake Beulah for bathing, boating and kindred purposes. Stoesser et al. v. Shore Drive Partnership, 172 Wis. 2d 660, 494 N.W.2d 204, (1992).

At the time of the declaratory judgment proceeding, the Association did not argue that they were "riparian owners" but, rather, that "the easement conveyed the riparian right of lake access to them." Stoesser, p. 669. At the time of the Wisconsin Supreme Court's decision in Stoesser, the Subdivision was likely precluded from arguing that it had the right to place a pier by virtue of the holding of the Wisconsin Court of Appeals in de Nava v. DNR, 140 Wis. 2d 213, 409 N.W.2d 151 (Wis. Ct. Apps. 1987).

5. The purpose of the proposed pier is to allow the backlot owners of the Association to maintain a pier and moor boats on the property in which they hold an easement. The Association did not seek to install a pier during the period of 1939 to 1989. In 1989 and 1990 the Association attempted to erect piers at the site, giving rise to the declaratory judgment proceeding in Walworth County Circuit Court. The pier placed by the Association was not placed seasonally at the same location at least once every four years since the easement was recorded in 1939. The applicants accordingly do not meet the requirements of sec. 30.131, Stats., relating to placement of piers by non-riparian owners.

The fifty year period after recording of the easement speaks volumes as to the intent of the parties with respect to the language relating to use of the lakeshore "...for boating, bathing and kindred purposes." The Subdivision did not claim the right to place a pier structure for half a century. Plainly, such placement was not an express part of the easement and was not interpreted by the parties to include any such right for several generations. The easement cannot be reasonably interpreted to authorize placement of a pier by the backlot Subdivision residents.

6. Even if the easement were somehow construed to allow for placement of a pier by the Subdivision, the DNR would not have authority to authorize such a placement under sec. 30.12, Stats., unless such placement met the provisions of sec. 30.131, Stats. The applicants are not riparians. Accordingly, they are not "riparian owners" within the meaning of sec. 30.12, Stats. (Nesta) They are not eligible for a permit to place a structure on the bed of a navigable waterway. The Department's interpretation of its statutory authority was reasonable and is entitled to some deference given the DNR's long standing experience and expertise in interpreting Chapter 30, Stats. The DNR and, by extension, the Division does not have authority to issue a sec. 30.12, Stats., permit to a non-riparian that does not meet the requirements of sec. 30.131, Stats.

7. The applicants have some limited rights associated with their easement. Previously, in the appellate courts, they have not sought to place a structure on the bed of the waterway. It may well be appropriate to consider the easement rights of the Association in connection with the permit application by the Shore Drive Partnership in case number 3-SE-96-0234.
8. The proposed structure would not materially obstruct existing navigation on Lake Beulah.
9. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.
10. The proposed structure would not reduce the effective flood flow capacity of Lake Beulah.
11. The proposed structure would not adversely affect water quality nor will they increase water pollution in Lake Beulah. The structures will not cause environmental pollution as defined in sec. 144.01(3), Stats.
12. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue or deny a permit for the construction and maintenance of a structure on the bed of a navigable waterway..
2. The applicants are not "riparian owners" within the meaning of sec. 30.12, Stats. An easement does not confer upon its holder the status of riparian owner. Stoesser, et al. v. Shore Drive Partnership, 172 Wis. 2d 660, 660-669, 494 N.W.2d 204 (1992)
3. The proposed facilities described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.
4. The easement does not expressly grant the Association the right to place a pier. The subsequent conduct of the parties is not consistent with an implied right to place a pier structure at the site. The wharf has not been placed at the same location at least once every 4 years since the written easement was recorded. The applicants have not met the requirements of sec. 30.131, Stats., Stats., relating to placement of piers by non-riparian owners.
5. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the permit application in the above-referenced matter be DENIED.

Dated at Madison, Wisconsin on November 18, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 267-2744

By Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.